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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. THOMAS ANTHONY JONES, Defendant and Appellant.	B207190 (Los Angeles County Super. Ct. No. VA100304)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvonne T. Sanchez, Judge. Affirmed.

Judith Vitek, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey, and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Thomas Anthony Jones appeals from the judgment entered after a jury convicted him on two felony counts of transportation of marijuana and possession of marijuana for sale and one misdeanor count of child endangerment. After a bifurcated proceeding in which the trial court found true allegations related to several prior convictions suffered by Jones, the court sentenced him to an aggregate state prison term of six years. On appeal Jones contends there is insufficient evidence to support his convictions and, because the mother of his children was an uncharged accomplice to the crimes, the court erred by failing to instruct the jury sua sponte that a conviction could not be based on her uncorroborated testimony. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 9:00 a.m. on February 10, 2007 two sheriff's deputies patrolling a high-crime, residential area of unincorporated Los Angeles County were flagged down by a female pedestrian. After the deputies stopped, they saw a young boy standing alone next to a parked station wagon. The boy appeared to be about five years old and was crying uncontrollably. One of the deputies approached the boy and asked his name. After several minutes, still crying, the boy responded, "My daddy left me." The deputies stayed with the child for approximately 90 minutes but no one returned to pick him up. They then took the boy to the sheriff's station. He was eventually released to the care of the Los Angeles County Department of Children and Family Services (DCFS).

Before leaving the area, one of the deputies searched the unlocked station wagon for information about the boy. In the glove compartment the deputy found a notarized contract transferring ownership of the station wagon from Charles Jamison to Jones, dated January 29, 2007 and witnessed by M.W. In the hatchback area of the wagon, the deputy found a knapsack containing documents identifying the boy as K.W., the son of Jones and M.W., who lived at an address about a half mile from the location of the station wagon. While searching the wagon, the deputy recognized the pervasive smell of unburnt marijuana. Near where he had found the backpack, as well as some diapers and other items necessary for the care of small children, the deputy found a black plastic garbage bag secured with a twist tie. The bag contained a large quantity of marijuana,

small plastic bags and a digital scale, but no pipes or other paraphernalia for smoking the marijuana. The marijuana was ultimately found to weigh 489 grams or slightly more than one pound.

Jones was arrested some months later and charged with transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)), possession of marijuana for sale (Health & Saf. Code, § 11359) and cruelty to a child by endangering health (Pen. Code, § 273a, subd. (b)). The information additionally alleged as to the first two counts that Jones had suffered one prior serious or violent felony conviction within the meaning of the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and one prior felony conviction resulting in a prison term (Pen. Code, § 667.5, subd. (b)). Finally, as to those same two felony counts, the information alleged Jones had suffered two felony narcotics-related convictions making him ineligible for probation (Health & Saf. Code, § 11370, subds. (a), (c)).

At trial, after the deputy who found K.W. had testified about the incident, the People called M.W. to testify. M.W. testified she had three sons with Jones, including K.W., the oldest. Jones was still her boyfriend although he lived some miles away at the time of the incident. M.W. stated she had gone with Jones to purchase the station wagon from Jamison and believed herself to be a co-owner of the car. She admitted, however, she had only driven the car on two occasions. Jones kept the wagon and regularly drove it to her apartment to visit the boys. She also testified Jones intended to return the car to Jamison because he had learned there was an outstanding bank lien on the car.

On February 10, 2007 Jones had arrived at her apartment between 8:00 a.m. and 9:00 a.m. and asked if he could take the boys to the store. M.W. assumed he drove to her apartment but, because she did not go outside, she did not actually see him with the station wagon that day. The two younger boys returned to the apartment in the early afternoon and told M.W. K.W. was still playing outside. She did not see him or become concerned until a relative called her with the message K.W. was in the custody of DCFS.

The People elicited a number of inconsistencies between M.W.'s trial testimony and some of her earlier statements. Several weeks after the incident, she had told Los

Angeles County Sheriff's Detective Enrique Rosado, a narcotics detective investigating the case, Jones was the owner of the car and did not mention the possibility he had planned to return the car to Jamison. She also told Rosado Jones had driven to the house on February 10, 2007 and had asked if he could take K.W., but not the other children, to the store to buy candy. In fact, she told the detective K.W. had been the only child home that day. Her testimony at the preliminary hearing was also inconsistent with her trial testimony. When impeached with these statements, she claimed she did not remember her previous statements but acknowledged her memory of events was better shortly after the incident than it was at trial.

In addition to his testimony about M.W.'s statements to him during the investigation, Detective Rosado testified in his opinion, based on the amount of marijuana, the small plastic bags, the scale and the lack of smoking paraphernalia, the marijuana was possessed for sale.

The jury convicted Jones on all counts.

DISCUSSION

1. *Jones's Convictions for Transportation and Possession for Sale of Marijuana Are Supported by Substantial Evidence*

To assess a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility

issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Jones's claim the jury's verdict on the felony drug counts was not supported by substantial evidence is groundless. With respect to the conviction for transportation of marijuana in violation of Health and Safety Code section 11360, subdivision (a), "'[t]ransportation of a controlled substance is established by carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character.' [Citation.] . . . [Citation.] 'The crux of the crime of transporting is movement of the contraband from one place to another.' [Citation.] The term 'transports' as used in the statute is 'commonly understood and of a plain, nontechnical meaning.'" (*People v. LaCross* (2001) 91 Cal.App.4th 182, 185 [the statute may be violated by carrying drugs on a bicycle]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682-685 [statute may be violated by carrying drugs on one's person while walking through a hotel parking lot]; *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1318 ["to satisfy the element of 'transportation' . . . , the evidence need only show that the vehicle was moved while under the defendant's control."])

Based on M.W.'s comments to Detective Rosado, Jones was the owner of the station wagon, had used it daily and had driven it to her apartment on the morning of February 10, 2007 to pick K.W. up to take him to the store. An hour later, K.W. was found more than half a mile from the apartment standing next to the car, complaining his father had left him. Even if no one saw Jones actually drive the car, M.W. testified he drove the car to her house every day to visit the children. Although she claimed not to have seen him with the car that morning, she admitted to Detective Rosado during the investigation that Jones had picked K.W. up to take him to the store sometime between 8:00 and 9:00 a.m. A reasonable inference from this evidence is that Jones drove K.W. from the apartment to the location where K.W. and the car were found within the previous hour while the marijuana was stored in the hatchback area of the car. That is

how the jury viewed the evidence. We cannot say the jury's finding was unreasonable as a matter of law.

The same evidence supports Jones's conviction for possession of marijuana for sale. "The essential elements of unlawful possession of a controlled substance are 'dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character. Each of these elements may be established circumstantially.'" (*People v. Martin* (2001) 25 Cal.4th 1180, 1184.) Possession may be constructive, that is, shown by evidence the defendant maintained control or the right to control the contraband. (*People v. Newman* (1971) 5 Cal.3d 48, 52, disapproved on another ground in *People v. Daniels* (1975) 14 Cal.3d 857, 862.)

None of the testimony suggested anyone other than Jones retained "dominion and control" over the station wagon. Moreover, as the deputy who found the marijuana testified, the smell was pervasive in the car. At trial, Jones attempted to diffuse the inference he too must have smelled the marijuana by emphasizing the deputy recognized the smell based on his past experience, experience Jones did not share. Nonetheless, we, like the jury, find it doubtful Jones neither recognized the smell nor explored the area in which he kept the boys' diapers and other supplies for the source of the pungent odor. Equally compelling was Detective Rosado's testimony explaining the basis for his opinion the marijuana was intended for sale. (See, e.g., *People v. Carter* (1997) 55 Cal.App.4th 1376, 1378 ["'experienced officers may give their opinion that the narcotics are held for purposes of sale based upon such matters as the quantity, packaging and normal use of an individual; on the basis of such testimony convictions of possession for purpose of sale have been upheld'"].) In sum, there was ample evidence to support Jones's convictions for transportation and possession for sale of marijuana.

2. *Jones's Conviction for Misdemeanor Child Endangerment Is Supported by Substantial Evidence*

Arguing his conviction for child endangerment was not supported by the evidence, Jones insists there was no evidence as to how long K.W. had been standing next to the

car or who had left him there. Jones even offers the preposterous assertion K.W. was no longer in danger once the deputies found him.

Characterizing these circumstances as an innocuous episode of a child left for a moment unattended or as a child having wandered unintentionally away from his home ignores K.W.'s incriminating statement ("My daddy left me") and M.W.'s equally incriminating statement Jones took the boys (or K.W. alone) from the apartment. Jones's evident abandonment of the child amply supported the jury's verdict.

3. *There Was No Duty To Instruct the Jury on Accomplice Testimony*

Penal Code section 1111 provides, "[a] conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." For the purpose of this section an accomplice is "defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Pen. Code, § 1111.)

To be chargeable with the same crime as the defendant and thus to be an accomplice under Penal Code section 1111, "it would be necessary for the witness to be considered a principal under the provisions of section 31, which includes '[all] persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or not being present, have advised and encouraged its commission.'" (*People v. Hoover* (1974) 12 Cal.3d 875, 879; see *People v. Stankewitz* (1990) 51 Cal.3d 72, 90 [definition of an accomplice "encompasses all principals to the crime including aiders and abettors and coconspirators"].) An accessory, however, cannot be prosecuted for the identical offense and therefore is not an accomplice. (*Hoover*, at p. 879.) To be an accomplice, a witness must have """guilty knowledge and intent with regard to the commission of the crime."""" (*People v. Daniels* (1991) 52 Cal.3d 815, 866-867, citations omitted; see *Stankewitz*, at pp. 90-91 [accomplice must act "'with knowledge of the criminal purpose of the

perpetrator and with an intent or purpose either of committing, or of encouraging, or facilitating commission of, the offense'"].)

Whether a person is an accomplice is a question of fact for the jury unless there is no dispute as to either the facts or the inferences to be drawn from the facts. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 960.) The defense bears the burden of proving a witness is an accomplice. (See, e.g., *People v. Frye* (1998) 18 Cal.4th 894, 969, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [accomplice status of a witness is a collateral fact issue having no bearing on the guilt or innocence of the accused; thus courts have uniformly held it is proper to allocate to the defendant the burden of proving a witness is an accomplice]; accord, *People v. Fauber* (1992) 2 Cal.4th 792, 834.)

As Jones asserts, the trial court has a duty to instruct sua sponte regarding accomplices and their testimony when the evidence is "sufficient to warrant the conclusion by a jury that a witness implicating the defendant was an accomplice." (*People v. Cooper* (1970) 10 Cal.App.3d 96, 102.) In essence, the trial court must instruct the jury that "the testimony of an accomplice is to be viewed with distrust and that the defendant may not be convicted on the basis of an accomplice's testimony unless it is corroborated." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271; *People v. Zapien* (1993) 4 Cal.4th 929, 982.)

Jones's contention the trial court erred in failing to instruct on the unreliability of accomplice testimony is premised entirely on his assertion M.W. had as much access to the station wagon as he did. However, there was no evidence M.W. exercised dominion or control over the car sufficient to expose her to liability as Jones's accomplice with respect to his criminal activities involving the marijuana found in the car. The contract found in the car identified Jones as the sole owner of the station wagon. According to the testimony at trial, Jones maintained the vehicle at his residence and drove it daily. M.W. may have driven the car on two occasions but plainly conducted herself—even if she claimed an ownership interest—as if the car belonged solely to Jones. Consistent with that understanding, Jones exercised unilateral control over it. Under any construction of

these facts, there was an insufficient basis for the jury to conclude M.W. was liable as an accomplice for the crimes charged; and, therefore, no duty to instruct the jury sua sponte on accomplice testimony.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.